



September 8, 2020

VIA FOIAONLINE.GOV AND EMAIL

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460
Phone: (202) 566-1667

Charles Smioldo
FOIA Coordinator
Department of Justice
Environment and Natural Resources Division
Law and Policy Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Phone: (202) 514-0424
Email: FOIARouting.ENRD@usdoj.gov

**Re: Freedom of Information Act Request: Indianapolis Power & Light Company
Petersburg Generating Station**

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from Sierra Club, a nonprofit organization whose purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

REQUESTED RECORDS¹

Sierra Club requests Records of the following type in the possession, custody, or control of the U.S. Environmental Protection Agency (“EPA”) and U.S. Department of Justice (“DOJ”) for the time period starting from **September 29, 2009 up through and including the date that you conduct your search for documents:**

1. All emails, text messages, faxes, voice mails, and other form of communications relating to the Petersburg Generating Station, with any person outside of the DOJ, from or to the following individuals: **a)** Jonathan D. Brightbill, Principal Deputy Assistant Attorney General with the Environment and Natural Resources Division of the Department of Justice; and **b)** Arnold S. Rosenthal, Senior Attorney with the Environment and Natural Resources Division of the Department of Justice.
2. All emails, text messages, faxes, voice mails, and other form of communications relating to the Petersburg Generating Station, with any person outside of the EPA, from or to the following individuals: **a)** Sabrina Argentieri, Attorney-Advisor, U.S. EPA; **b)** Louise Gross, Associate Regional Counsel, U.S. EPA Region 5; **c)** Susan Parker Bodine, Assistant Administrator Office of Enforcement and Compliance Assurance, U.S. EPA; **d)** Rosemarie A. Kelley, Director, Office of Civil Enforcement, U.S. EPA; **e)** Evan Belser, Acting Director Air Enforcement Division, U.S. EPA; **f)** T. Leverett Nelson, Regional Counsel, U.S. EPA Region 5.
3. All emails, text messages, faxes, voice mails, and other form of communications, from or to any employee of the U.S. EPA, with the Indianapolis Power & Light Company, its employees, agents, or legal counsel.
4. All documents and communications (including but not limited to emails, text messages, faxes, voice mails, and other forms of communication from or to any employee of the U.S. EPA) relating to the “Environmental Mitigation Project” described on page 26 of the proposed Consent Decree in Case No. 3:20-cv-00202-RLY-MPB, filed on August 31, 2020.
5. All emails, faxes, voicemails, texts or other forms of communication that have been deleted which fit the above specifications and which remain recoverable in any way. If

¹ “Records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the DOJ or the EPA, National Headquarters and all of its Offices, Regions and other subdivisions.

fulfilling this specification requires additional time, we would ask that production of documents meeting specifications 1-3 be given priority and processed separately from any potential responsive records to this specification.

For purposes of this request, the terms “person outside of EPA” and “person outside of DOJ” mean any person who is **not** an employee within the EPA or DOJ, respectively. You may specifically exclude from processing and release any records that are publicly available (e.g., through regulations.gov).

This request includes communication related that is or was on any system or device, computer, phone, smartphone, tablet, email account, cloud, server or other communication system either **personal or business** that is or was owned **or** operated by the EPA and DOJ personnel described above or otherwise established for the purposes of communicating with the EPA and DOJ personnel. This request includes all emails or other communications from any **personal** account operated by the EPA and DOJ personnel which have been forwarded into an EPA or DOJ government email account.

This request applies to all email accounts assigned to or operated by the named EPA and DOJ personnel, whether on an official EPA or DOJ email address or server or not, that relate to official business of EPA or DOJ. This request applies to so-called “alias” email accounts that may or may not include the name(s) of the EPA and DOJ personnel in the email address.

DUTY TO PRESERVE RECORDS

EPA and DOJ must preserve all the records requested herein while this FOIA is pending or under appeal. 40 C.F.R. § 2.106 (“[r]ecords shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA”); 28 C.F.R. § 16.9 (same); *see Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (“an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act”). Accordingly, please immediately advise custodians of potentially responsive records that the above records have been requested under FOIA and therefore may not be destroyed.

If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held EPA in contempt for “contumacious conduct” and ordered the agency to pay plaintiff’s costs and fees for destroying “potentially responsive material contained on hard drives and email backup tapes.” *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep’t of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys’ fees and costs because, among other factors, agency’s “initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed”), *aff’d in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred

him to the Department of Justice's Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and deliver the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in the format requested if the record is readily reproducible by the agency in that format. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B). We request that you provide electronic documents individually, and not as batched files. Specifically, for any document stored as Electronically Stored Information (ESI), we request that the document be produced in the native file type. This includes e-mail (whether sent, received or drafted), word-processing files, tables, charts, graphs and database files, electronic calendars, proprietary software files, and spreadsheets. ESI can also be provided in the form of a load file that includes a common file type (TIFF, HTML, PDF) while maintaining access to the native file and its source data, including the ability to keyword search documents.

RECORD DELIVERY

We appreciate a prompt determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in Sierra Club filing an action before the relevant U.S. District Court to ensure timely receipt of the requested materials. You may email copies of the requested records to:

Precious Onuohah
precious.onuohah@sierraclub.org

Megan Wachspress
megan.wachspress@sierraclub.org

If you are unable to deliver the documents through electronic means, please deliver the documents to:

Precious Onuohah
Sierra Club - Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612

Please send documents on a rolling basis. DOJ's and EPA's search for—or deliberations concerning—certain records should not delay the production of others that DOJ and EPA have already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines); 28 C.F.R. § 16.5 (same).

FEE WAIVER REQUEST

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii), 40 C.F.R. § 2.107(l), and 28 C.F.R. § 16.10(k). Sierra Club is the nation's oldest grassroots organization with more than 3 million members and supporters nationwide. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy and clean water. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.²

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club access to government records without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups.").

² For recent examples, *see* FOIA Request Reference No. EPA-HQ-2017-2172 (fee letter waiver received Jan. 9, 2017); FOIA Request Reference No. EPA-HQ-2017-008402 (fee letter waiver received June 26, 2007); FOIA Request Reference No. EPA-HQ-2017-008571 & EPA-HQ-2017-008581 (fee letter waiver received June 27, 2017); FOIA Request Reference No. EPA-HQ-2017-008568 (fee letter waiver received June 28, 2017).

As explained below, this FOIA request satisfies the factors listed in EPA's and DOJ's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l); 28 C.F.R. § 16.10(k).

1. The subject matter of the requested records specifically concerns identifiable “operations and activities of the government.”

The requested records relate to the communications of EPA and DOJ personnel, which reflect the activities and work of these personnel on behalf of the agency, and specifically records relating to EPA oversight and EPA and DOJ litigation under the Clean Air Act. The documents concern “identifiable operations or activities of the government.”

2. The disclosure of the requested documents would be meaningfully informative and “likely to contribute to an understanding of Federal government operations or activities.”

Disclosure of the requested records will allow Sierra Club to convey information to the public about the communications of the EPA and DOJ personnel in relation to a power plant that has been alleged to be responsible for numerous violations of the Clean Air Act, which the DOJ and EPA have recently sought to resolve through a consent decree.

Once the requested documents are made available, Sierra Club will analyze them to determine whether any communications or facts outside the four corners of the complaint informed the DOJ's and EPA's decision to seek a consent decree to address the alleged violations at the Petersburg Generating Facility, and whether any individuals outside the EPA and DOJ influenced or otherwise played a role in developing the terms of the proposed consent decree. Sierra Club will present this information to its members and individuals in the vicinity of the Petersburg plant who have or may be affected by air emissions there.

The requested records are not otherwise in the public domain and are not accessible other than through a FOIA request. Indeed, the request explicitly excludes those documents already publicly available. Thus, the requested documents provide information that is not already in the public domain and are accordingly likely to meaningfully contribute to public understanding of governmental operations. The requested records relate to a consent decree reached through negotiations between Indianapolis Power and Light (“IPL”) and EPA and DOJ officials undertaken prior to the filing of a formal complaint and filed simultaneously with the suit itself, raising concerns about the degree to which such negotiations were truly arms-length.

3. The disclosure would contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.

Sierra Club has long-standing experience and expertise in the subject area of the FOIA requests, including issues related to government accountability and transparency, the Clean Air Act, Clean Water Act, climate policy, the protection of the natural environment, and the development and use of energy resources.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: analysis and distribution to the media, distribution through publication and mailing, posting on its website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. In the past year the Sierra Club website received more than 26 million unique visits and over 30 million page views; on average, the site gets more than 70,000 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3 million people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system.

Sierra Club intends to share the information received from this FOIA request with the public at large, our members, the media and our allies who share a common interest in air pollution at Petersburg and the adequacy of the EPA's response to Clean Air Act violations there.

Sierra Club unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the "public-at-large."

4. The disclosure would contribute "significantly" to public understanding of government operations or activities.

As discussed in section (2) above, the records requested will significantly contribute to the public understanding of governmental operations, and activities. On August 31, 2020, the EPA and DOJ filed both a complaint alleging numerous significant violations of the Clean Air Act at the Petersburg Generating Station and proposed consent decree to resolve these claims. If approved, the consent decree will foreclose any further relief relating to air pollution violations dating back to 2009 and allegations that IPL undertook major modifications to the Petersburg Generating Station Disclosure in violation of federal law that resulted in significant increases in sulfur dioxide, nitrogen oxide, sulfuric acid, and particulate matter emissions. The named individuals were signatories to the complaint and/or consent decree. Records of these EPA and DOJ Personnel's communications relating to a proposed settlement agreement regarding a plant with a history of significant Clean Air Act violations will significantly enhance the public's understanding of the merits and any drawbacks to the proposed settlement, as well as the degree

to which these individuals (at least one of which has a prior relationship to a firm which has represented IPL for many years) vigorously pursued the maximally beneficial settlement for individuals subject to air pollution from the Petersburg plant and on behalf of the United States government.

5. The requester has no commercial interest that would be furthered by the requested disclosure.³

Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. Sierra Club is a nonprofit, tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

Sierra Club respectfully requests that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) because the public will be the primary beneficiary of this requested information. In the event that your agency denies a fee waiver, please send a written explanation for the denial. In the event that fees are ultimately assessed, please do not incur expenses beyond \$250 without first contacting our office for explicit authorization.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (773) 704-9310 or by email at megan.wachspress@sierraclub.org.

/s/ Megan Wachspress
Megan Wachspress
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612

³ Because Sierra Club has no commercial interest, it is not necessary to consider the final factor for a fee waiver, which compares the magnitude of an identified commercial interest to the public interest in disclosure.